

# Reforming the Corporate Taxation in The European Union: Paradox, Challenge and Opportunity



Written by Shu-Chien Chen

Despite the European Union's (EU) history of development for more than five decades; the EU is now suffering from a backlash and crises. The prevalence of aggressive tax avoidance scenarios conducted by multinationals is one of the most heated issues. This paper will explain the paradox in the development of EU law regarding direct taxation, and points out the challenges and opportunities available in the development of this specific sector of EU legislation. The reflections generated from studying the EU might be useful for other regional integration projects, such as NAFTA, ASEAN or Union of South American Nations (USAN).

To this day, EU law does not achieve much regarding direct taxation. This lack of direction presents itself as a first-level paradox: EU harmonization law aims to reduce taxpayers' compliance costs and improve the EU's internal market; in reality, EU harmonization law is fragmented and full of political compromises. The proposed tax reforms from the EU all look promising, but real progress is rare due to EU legislation proposals, regarding direct taxation, having to be passed unanimously. From the mid-1980 until 2018, there have only been a handful of Directives on the subject of direct taxation in EU law that have passed. Furthermore, Member States are still eagerly competing with each other to make themselves attractive to foreign investors. This drive to remain competitive is the second-level paradox: on the one hand, EU Member States have their solidarity commitment to maintain the EU internal market as a borderless free market; on the other hand, EU Member States are eager to maintain their diversity and to compete.

The paradox within the EU harmonization laws on taxation seems inevitable. The EU does not have powers to levy tax from individuals or companies. The harmonization of EU legislation on taxation merely provides a framework, leaving an element of discretion to EU Member States regarding its implementation. Such harmonization is largely based on national tax laws or experiences from international tax treaties. However, due to the sensitive nature of the direct taxation as fiscal autonomy, EU law has never extensively harmonized corporate tax. Even though national corporate tax laws have become barriers for cross-border economic activities, due to disparities and mismatches between national tax laws which would create high compliance burdens for cross-border economic operators, Member States are still quite cautious to take on reformed tax proposals.

Besides, although there are some cooperation mechanisms between tax authorities, there is no "one-stop shop" mechanism for companies to file their tax returns across the EU. Other tax reform proposals, such as Financial Transaction Tax or Common Consolidated Corporate Tax Base (CCCTB), have been long pending. There have also been some failed and

withdrawn proposals, such as cross-border intra-group loss offsetting. In comparison to the slow pace of most tax reform proposals, the Anti-Tax Avoidance Directive (ATAD), consisting of several typical anti tax-avoidance rules, was unanimously and quickly accepted by all EU Member States. This was due to the directives direct reflection of the current trend in the field of international tax- combating profit shifting and base erosion (BEPS), seen especially through tax avoidance scenarios conducted by multinational enterprises.

Some argue that it is more practical to allow EU Member States to “exit from some EU tax law regimes” after an attempt at implementation of the aforementioned regime, in order to encourage EU Member States to make some progress in the field of corporate tax. Such an approach looks practical, however, does not fully address the question of balancing both harmonization and diversity. In my opinion, to address such a paradox and to break the current deadlock, it would be necessary to build a multi-dimensional normative framework. This framework would not be built around a business friendly perspective, with the aim of constructing an internal market, but would also incorporate elements of fairness and redistribution into the overall perspective. Merely pursuing efficiency wouldn't be sufficient in regard to addressing the complexity of the corporate taxation. When it comes to the justification of taxation at the national level, the the creation of overall benefits provides a convincing argument- when a state provides true benefits to the citizens, levying tax is justified. In my view, the benefit principle should also apply to the EU context regarding allocating taxing powers between Member States. Besides, to develop a successful proposal with the field of corporate tax law, it would be more convincing to apply the perspective of the subsidiarity principle, according to which the EU has to demonstrate the added value and the proportionality of any new legislation proposed.

EU harmonization should never mean eliminating diversities, though harmonization does reduce unnecessary disparities. The subsidiarity principle is not only used to challenge the legitimacy of EU law, but also as a basis of efficiency. In fact, over-harmonization would not achieve



economic efficiency either, since every Member State has its own distinctive resources and society features and thus should have the freedom to decide the level of public benefits and how to levy tax to provide these public benefits. With such freedom, EU Member States can conduct fair competition to provide the most efficient service to attract individuals and businesses. Therefore, combining the benefit principle and the subsidiarity principle seems to be a new opportunity for addressing the paradox in the development of EU tax laws.

“Unity in diversity” is the essence and origin of EU integration. This motto might sound naive, but it could be the solution to the current issues confronted by the EU. When the EU can convince citizens that a specific measure by the EU brings true benefits to the public, such measures can be accepted in a quick and easier manner. Re-distribution and combating tax avoidance should be understood as a type of public benefit, with the example of the Anti Tax-avoidance directive providing a persuasive framework for why the people should be supporting the EU in her fight against tax avoidance. A new normative framework for all EU tax reform proposals would be the best opportunity to successfully tackle tax avoidance, through combining the benefit principle and the subsidiarity principle, and thus bringing back the ultimate and fundamental belief in EU integration. This new framework would allow for the pursuit of economic integration whilst fostering the diversity across Member States to compete, consequently achieving a structure true efficiency, as well as fairness between individuals.

*Shu-Chien Chen graduated from National Taiwan University and passed the Taiwanese lawyer examination. Before moving to the Netherlands, Shu-Chien worked at Keelung Customs, Ministry of Finance in Taiwan as a legal officer. Later, she studied in Leiden University and Radboud University Nijmegen in the Netherlands and received LLM degrees. Currently, she is a PhD candidate at the Erasmus University Rotterdam and she is pursuing Bachelor of Laws at University of Amsterdam (in Dutch) to qualify as a Dutch lawyer. Her research interests include EU*

*law, comparative law, law reform, tax law, trade law and data protection.*

## References

Thomas Piketty, *Capital in the Twenty-First Century*, Ch.16, Harvard University Press, 2017

Article 115 of Treaty of Functioning of European Union (TFEU)

The overview, see Łukasz Adamczyk and Alicja Majdańska, The Sources of EU Law Relevant for Direct Taxation in Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch and Claus Staringer (eds), *Introduction to European Tax Law on direct Taxation*, Linde Verlag, 2018.

Council Directive 2011/16/EU.

Proposal for A Council Directive Concerning Arrangements for The Taking Into Account by Enterprises of The Losses of Their Permanent Establishments And Subsidiaries Situated In Other Member States, COM (1990) 595, available at <https://eur-lex.europa.eu/procedure/EN/11773> It was drafted in 1990 and withdrawn in 2001.

Council Directive (EU) 2016/1164.

Richard Krever, General Report, GAARs – A Key Element of Tax Systems in the Post-BEPS World in Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch and Claus Staringer (eds), *GAARs – A Key Element of Tax Systems in the Post-BEPS World*, IBFD, 2016, pp. 1-20.

Wolfgang Schön (2018), Debate: Facilitating Entry by Facilitating Exit: New Paths in EU Tax Legislation, *Intertax* 46 (4), pp. 339–341.

Matthew Weinzierl (2018), Revisiting the Classical View of Benefit-based Taxation, *The Economic Journal*, 128(612), pp. F37-F64, at F.38.